No. 02-94

Supreme Court, U.S.
FILED
FEB 18 2005
CLERK

In The
Supreme Court of the United States

WILLIAM OVERTON, DIRECTOR OF MICHIGAN DEPARTMENT OF CORRECTIONS, et al.,

Petitioners,

v.

MICHELLE BAZZETTA, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICI CURIAE NATIONAL COUNCIL OF LA RAZA, SOUTHERN CENTER FOR HUMAN RIGHTS, PERRY JOHNSON, ROBERT BROWN JR., AMERICAN ASSOCIATION OF COMMUNITY PSYCHIATRISTS, NATIONAL MENTAL HEALTH ASSOCIATION, NATIONAL ALLIANCE FOR THE MENTALLY ILL AND ITS MICHIGAN CHAPTER, NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, CENTER FOR THE STUDY OF SOCIAL POLICY, CORRECTIONAL ASSOCIATION OF NEW YORK, JUSTICE POLICY INSTITUTE, MICHIGAN LEAGUE FOR HUMAN SERVICES, PRISONS AND CORRECTIONS SECTION OF THE STATE BAR OF MICHIGAN, LEAGUE OF WOMEN VOTERS OF MICHIGAN, PAULA SCHAEFFER, GEORGE SULLIVAN, URBAN JUSTICE CENTER, PRISON ACCESS WORKING GROUP, STOP PRISONER RAPE, CRITICAL RESISTANCE, BISHOP COLEMAN MCGEHEE, RT. REV. R. STEWART WOOD, JR, METROPOLITAN ORGANIZING STRATEGY ENABLING STRENGTH, EPISCOPAL CHURCH OF THE INCARNATION, RESTORATIVE JUSTICE MINISTRY, SHALOM CENTER FOR JUSTICE AND PEACE, AND COLONEL ROBERT C. LYNN IN SUPPORT OF RESPONDENTS FOR AFFIRMANCE

RODERICK M. HILLS, JR.
Counsel of Record
UNIVERSITY OF MICHIGAN
LAW SCHOOL
437 Hutchins Hall
625 South State Street
Ann Arbor, MI 48103-1215
(734) 763-9635

BEST AVAILABLE COPY

QUESTIONS PRESENTED

This brief addresses only the first two questions certified by the Court:

1. Whether prisoners have a right to non-contact visitation protected by the First and Fourteenth Amendments;

2. Whether the restrictions on non-contact prison visitation imposed by the Michigan Department of Corrections are reasonably related to legitimate penological interests.

TABLE OF CONTENTS

Page

Interest of Amici Curiae 1

Argument 1

I. Prisoners and non-incarcerated relatives seeking to visit them retain rights of familial association, including rights to visit close relatives, unless those rights are inconsistent with some legitimate penological interest of the state 1

A. The constitutional rights of prisoners are not determined by 19th century prison practices but rather by contemporary and evolving standards of decency 3

B. The fundamental right of familial association and visitation survives incarceration unless restrictions on that right serve some legitimate penological purpose 6

II. MDOC has no legitimate penological interest justifying its prohibition on minors' visiting imprisoned relatives 13

A. MDOC's exclusion of minors from non-contact visits with imprisoned relatives bears no reasonable relation to the purpose of reducing overcrowding or increasing security in the prisons' visiting facilities..... 14

TABLE OF CONTENTS – Continued

Page

B. MDOC has no legitimate penological interest in overriding parents' judgment about whether visits serve the best interest of their children by prohibiting minors from visiting imprisoned relatives to protect children from the prison environment 15

III. Michigan's policy of permanently barring prisoners who have incurred two citations for substance abuse from any visitation with any relative is an exaggerated response to the problem of substance abuse 20

A. MDOC's permanent and total ban on visitation burdens fundamental rights of familial association 21

B. No other state has adopted a permanent and total ban on visitation for misconduct unrelated to visitation 25

C. Substantial evidence supports the district court's finding that MDOC's permanent and total ban on visitation promoted rather than deterred substance abuse 27

TABLE OF AUTHORITIES

Page

CASES

Arcara v. Cloud Books, 478 U.S. 697 (1986).....24

Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002).....5

Bazzetta v. McGinnis, 148 F.Supp.2d 813 (E.D. Mich. 2001).....*passim*

Bell v. Wolfish, 441 U.S. 520 (1979).....28

Berch v. Stahl, 373 F.Supp. 412 (W.D.N.C. 1974) 8

Block v. Rutherford, 468 U.S. 576 (1984) 10, 11, 24

Boudin v. Thomas, 533 F.Supp. 786 (S.D.N.Y. 1982).....8

Branzburg v. Hayes, 408 U.S. 665 (1972).....23

Burnham v. Superior Court, 495 U.S. 604 (1990).....5

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).....7

Hardaway v. Kerr, 573 F.Supp. 419 (W.D. Wis. 1983).....20

Hoversten v. Superior Court, 74 Cal.App.4th 636, 88 Cal.Rptr.2d 197 (1999).....8

Hutto v. Finney, 437 U.S. 678 (1978).....4

In re Medley, 134 U.S. 160 (1890).....4

In re Smith, 169 Cal.App.3d 956 (1980).....8

Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).....4

Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454 (1989).....9, 10, 11, 24

M.L.B. v S.L.J., 519 U.S. 102 (1996).....6

TABLE OF AUTHORITIES – Continued

Page

Mabra v. Schmidt, 356 F.Supp. 620 (W.D. Wis. 1973).....8

Meyer v. Nebraska, 262 U.S. 390 (1923).....6

Mitchell v. Untreiner, 421 F.Supp. 886 (N.D. Fla. 1976).....8

Moore v. City of East Cleveland, 431 U.S. 494 (1977).....11, 12, 13

O'Bryan v. County of Saginaw, 437 F.Supp. 582 (E.D. Mich. 1977) 8

Olim v. Wakinekona, 461 U.S. 238 (1983) 23

Parham v. J.R., 442 U.S. 584 (1979) 7, 16

Pell v. Procunier, 417 U.S. 817 (1974) 7, 9, 10, 28

Pierce v. Society of Sisters, 268 U.S. 510 (1925).....6

Poe v. Ullman, 367 U.S. 497 (1961).....5, 6

Prince v. Massachusetts, 321 U.S. 158 (1944) 7

Printz v. United States, 521 U.S. 898 (1997).....5

Quilloin v. Walcott, 434 U.S. 246 (1978).....6

Rhem v. Malcolm, 507 F.2d 333 (2d Cir. 1974).....8

Santosky v. Kramer, 455 U.S. 745 (1982).....6

Smith v. Organization of Foster Families, 431 U.S. 816 (1977).....6

Stanley v. Illinois, 405 U.S. 645 (1972) 7

Trop v. Dulles, 356 U.S. 86 (1958) 5

Troxel v. Granville, 530 U.S. 57 (2000).....*passim*

Turner v. Safley, 482 U.S. 78 (1987).....*passim*

TABLE OF AUTHORITIES – Continued

Page

Valentine v. Englehardt, 474 F.Supp. 294 (D.N.J. 1979) 8, 20

Washington v. Davis, 426 U.S. 229 (1976) 23

Weems v. United States, 217 U.S. 349 (1910) 4

White v. Keller, 438 F.Supp. 110 (D. Md. 1977) 8

REGULATIONS

Cal. Admin. Code title 15 §§3315(f)(5)(I), 3323(d)(6) 26

Colo. Dep't of Corrections Admin. Reg. 300-01.IV.L.10.b 26

Fla. Admin. Code Rule 33-601.731(2)(b) 26

Id. 604.02.001.0505.00 26

Ia. Corrections Policy No. IN-V-3(V)(L) 26

Md. Div. of Corrections DCD 105-4 App.3 26

Minn. Dep't of Corrections Directive 302.100B 26

Miss. Dep't of Corrections S.O.P. 28-03-02 & 31.03.01 26

N.C. Inmate Disciplinary Procedures Ch.B. §§.0202 &. 0204 26

N.H. Dep't of Corrections PPD7.9(IV)(P) 26

N.Y. Comp. Codes, R. & Regs. tit. 5, §200.5(a)(4) and 5(f) 26

Oh. Dep't of Rehabilitation and Correction §308 No. 4, Part VI(K)(2) & §312 No. 02, Pt. (VI)(L) 26

Ok. Dep't of Corrections OP-030118(II)(E)(5) 26

R.I. Admin. Code 06.070.004(III)(E)(13) 26

TABLE OF AUTHORITIES – Continued

Page

S.C. Dep't of Corrections OP-22.09 26

Tenn. Dep't of Corrections Reg. 507.01(VI)(F)(7) 26

OTHER AUTHORITIES

Justin Brooks, et al, *"It's a Family Affair" – The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U. San Francisco L. Rev. 271, 306 (1994) 18

BONNIE CARLSON, ET AL., INMATES AND THEIR WIVES: INCARCERATION AND FAMILY LIFE (Westport, Connecticut: Greenwood Press, 1992) 27

FISHMAN, WOMEN AT THE WALL: A STUDY OF PRISONERS' WIVES DOING TIME ON THE OUTSIDE (Albany: State University of New York, 1990) 18

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, MODEL SENTENCING AND CORRECTIONS ACT § 4-115, Comment (1979) 18

Justice Sandra O'Connor, *The Supreme Court and the Family*, 3 U. Pa. J. Const. L. 573, 577 (2001) 16

DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 79-108 (rev. ed. 1990) 3, 4

William H. Sack, *Children of Imprisoned Fathers*, 40 Psychiatry 163, 164-65 (1977) 18

SCHNELLER, THE PRISONERS' FAMILY: A STUDY OF THE EFFECTS OF IMPRISONMENT ON THE FAMILIES OF PRISONERS (San Francisco: R and E Research Associates, 1976) 18

SHAW, CHILDREN OF IMPRISONED FATHER (London: Hodder and Stoughton, 1987) 18

TABLE OF AUTHORITIES – Continued

Page

STANTON, WHEN MOTHERS GO TO JAIL (Lexington Mass: Lexington Press, 1980) 18

SWAN, FAMILIES OF BLACK PRISONERS: SURVIVAL AND PROGRESS (Boston: C. K. Hall, 1981) 18

INTEREST OF THE *AMICI CURIAE*[1]

The statements of interest of the *amici curiae* are set forth in the Appendix.

ARGUMENT

I. Prisoners and non-incarcerated relatives seeking to visit them retain rights of familial association, including rights to visit close relatives, unless those rights are inconsistent with some legitimate penological interest of the state.

Both the *amicus* brief of the United States and the petitioners' brief submitted by the Michigan Department of Corrections (MDOC) make the sweeping assertion that prisoners retain no 14th Amendment right whatsoever to visit with non-incarcerated members of their family. To support such a claim of governmental omnipotence over visitation, the United States offers two arguments. First, the United States argues that, because *many* sorts of visitation could be inconsistent with legitimate penological objectives, a right to any sort of visitation, no matter how circumscribed, must therefore be "in derogation of incarceration." U.S. *Amicus* Brief at 11. Second, the United States argues that such a right falls outside the

[1] No counsel for any party authored any part of this brief. No persons or entities other than the *amici curiae* made any monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.3, copies of letters of consent to the filing of this brief have been lodged with the Court.

14th Amendment because such a right is inconsistent with "early historical practice" of prison administration in antebellum United States – a period before the 14th Amendment was enacted.

These sweeping assertions fundamentally misunderstand the appropriate analysis of prisoners' rights under *Turner v. Safley*, 482 U.S. 78 (1987) in two ways. First, the rights of prisoners – like the rights of citizens generally – have never been measured by now-discredited 19th century historical practices. Second, abstract generalities about the nature of incarceration have never defined prisoners' rights. Instead, this Court asks whether a *particular* restriction on prisoners' rights is justified by some *specific* penological objective. Where such a legitimate purpose exists, prison authorities can restrict prisoners' rights of familial association, no matter how fundamental. However, by the same logic, where such a penological justification is absent, this Court rejects restrictions on prisoners' fundamental rights. Thus, while prisoners cannot enjoy any unfettered or absolute right of familial association or visitation, it is equally true that prison authorities do not enjoy any unfettered or absolute power to restrict visitation. Instead, *Turner v. Safley* teaches that the Court should make an inquiry *specific* to the challenged regulation to determine whether the regulation's purpose is legitimately penological.

A. The constitutional rights of prisoners are not determined by 19th century prison practices but rather by contemporary and evolving standards of decency.

This Court measures the rights of prisoners by *contemporary* standards of decency, not historical practices that have lapsed into desuetude.

It is true that, beginning in the 1830s, some states – notably, New York's so-called Auburn "congregate" system and the Pennsylvania "total isolation" system – experimented with extreme forms of prisoner isolation in penitentiaries. DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 79-108 (rev. ed. 1990). Even in antebellum America, contemporary critics noted that such extreme deprivation of human contact was a form of torture that could drive a prisoner insane. ROTHMAN at 87. By the late 19th century, the practice of total isolation of prisoners from friends and family had been abandoned, in part because of perceptions of its unnatural cruelty. ROTHMAN at 243-46. As this Court observed in 1890 when holding that solitary confinement could not be imposed retroactively as an additional punishment against a death-row inmate,

> [E]xperience demonstrated that there were serious objections to [the total isolation system]. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent

> service to the community. Its main feature of solitary confinement was found to be too severe.

In re Medley, 134 U.S. 160, 168 (1890). Total isolation, moreover, was part and parcel of a larger attitude that encouraged routine physical torture of prisoners, such as floggings, punitive cold showers, and iron gags. ROTHMAN at 101-102. Both the physical and psychological tortures of the Auburn system were rooted in precisely the same mentality – the theory that the government was entitled to exercise total control over the prisoners' mind and body and that "practically any method that enforced discipline was appropriate." ROTHMAN at 102.

If the United States is correct that "early historical practices" like the Auburn experiment justify extreme restrictions on visitation, it would also follow that the same "historical practices" would justify floggings, cold water torture, ball and chains, and iron gags, which were equally part of the 19th century's "historical practices." Of course, this Court has long held that such physical tortures are impermissible under the 8th Amendment, irrespective of their historical pedigree. *See, e.g., Weems v. United States*, 217 U.S. 349, 373 (1910) (continuous confinement by ankle chain while at hard labor can constitute cruel and unusual punishment); *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968) (per Blackmun, J.) (whipping with strap can constitute violation of 8th Amendment). By the same token, historical practices, now long-discredited and discontinued, cannot ratify *psychological* torture of cutting prisoners from all visitation. *Cf. Hutto v. Finney*, 437 U.S. 678, 686-87 (1978) (lengthy confinement in total isolation can violate 8th Amendment).

Rather than being governed by now-obsolete historical practices, the scope of 14th Amendment rights in prison is governed by our evolving sense of decency, reflected both in widespread contemporary practices and *continuing* historical traditions. *Burnham v. Superior Court*, 495 U.S. 604, 615, 618 (1990) (upholding in-state service of process as consistent with due process because "[t]his American jurisdictional practice is not merely old; it is *continuing*" and holding that the "*continuing* traditions of our legal system" define due process required by 14th Amendment) (emphasis added). As Justice Harlan observed in his dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961), this Court must examine "the balance struck by this country, having regard to what history teaches are the traditions from which it developed *as well as the traditions from which it broke*" (emphasis added). Because the relevant historical traditions are "a living thing," *id.*, this Court must disregard those historical practices that have been long abandoned by the nation and which contradict widespread contemporary consensus. As this Court has recently stated, "[a] claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail." *Atkins v. Virginia*, 536 U.S. 304, ___, 122 S. Ct. 2242, 2247 (2002). Likewise, the status of the right to visitation is not to be judged by the standards of the 1830s, before the 14th Amendment was even ratified, but instead by "the evolving standards of decency that mark the progress of a maturing society." *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958)). *See also Printz v. United States*, 521 U.S. 898, 916-17 (1997) (finding that nation's traditions bar Congress from commandeering state executive officials in part because "there is an

absence of [federal commandeering of state executives] in our later history as well").

B. The fundamental right of familial association and visitation survives incarceration unless restrictions on that right serve some legitimate penological purpose.

Guided by these principles forbidding "all substantial arbitrary impositions and purposeless restraints" that are inconsistent with our "evolving standards of decency," *Poe v. Ullman*, 367 U.S. at 542 (Harlan, J., dissenting), three propositions are clear from contemporary practice and judicial precedent.

First, "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (holding that the state may not interfere with familial relationship absent clear and convincing evidence of parental neglect). Beginning with its seminal decisions in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court repeatedly re-affirmed the principle that the 14th Amendment's due process clause presumptively prohibits the government from interfering with familial relationships.[2] In particular, this Court has repeatedly held that

[2] *See, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) ("choices about marriage, family life and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in society,' . . . rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard or disrespect"); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431

(Continued on following page)

state officials must afford deference to parents' decisions concerning what sorts of visitation will serve the best interests of their children, because the Court presumes that "natural bonds of affection lead parents to act in the best interests of their children." *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (plurality opinion) (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979) and holding that Washington's state visitation statute violates 14th Amendment because "a parent's decision that visitation would not be in the child's best interest is accorded no deference").

Second, prisoners are not automatically stripped of such a right of familial association merely because they are imprisoned. As this Court held in *Turner v. Safley*, 482 U.S. 78 (1987), prisoners retain their fundamental rights of familial association absent a legitimate penological justification for restricting these rights. Thus, *Turner* held that prison officials could not prohibit a prisoner from marrying, because "the limitations imposed by prison life" did not require such a prohibition. 482 U.S. at 95. *Turner* requires exactly the same analysis for other rights of familial association: if restrictions on such liberties do not serve any penological purposes, then persons retain those liberties even while incarcerated. *Turner,* 482 U.S. at 89 ("when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests"); *Pell v. Procunier,* 417 U.S. 817, 823 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent

U.S. 816, 845 (1977); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974); *Stanley v. Illinois*, 405 U.S. 645, 651-652 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

with his status as a prisoner or with the legitimate penological objectives of the corrections system.").

Third, prisoners' rights of familial association include rights to visit with relatives where exercise of those rights does not interfere with any penological objective. This principle is suggested not only by the vast majority of lower court decisions which have addressed the issue,[3] but

[3] *See, e.g., Hoversten v. Superior Court*, 74 Cal.App.4th 636, 88 Cal.Rptr.2d 197 (1999) (inmates retain the right of reasonable visitation with their minor children); *Boudin v. Thomas*, 533 F.Supp. 786, 793 (S.D.N.Y. 1982) (bar on parent-child contact visits violates constitutional rights of inmate and visiting child); *In re Smith*, 169 Cal.App.3d 956, 968-69 (1980) (jails' bar on minor children's visiting violates fundamental right of familial association and is exaggerated response to security interests of jails); *Valentine v. Englehardt*, 474 F.Supp. 294, 302 (D.N.J. 1979) (prisoners retain right of reasonable visitation because "it simply does not lie with jail officials to determine what is in the best interests of the inmates' children"); *O'Bryan v. County of Saginaw*, 437 F.Supp. 582 (E.D. Mich. 1977) (bar on contact visits between family members and pre-trial detainees burdens "zone of privacy" protected by 1st and 14th Amendments); *Mitchell v. Untreiner*, 421 F.Supp. 886 (N.D. Fla. 1976) (overturning prohibition on children's visits with pre-trial detainees as violation of First Amendment); *Rhem v. Malcolm*, 507 F.2d 333 (2d Cir. 1974) (upholding district court's decision that ban on contact visits with pre-trial detainees is unconstitutional); *Berch v. Stahl*, 373 F.Supp. 412 (W.D.N.C. 1974) (prolonged denial of visitation privileges between inmate and wife violates fundamental right to maintain family relationships); *Mabra v. Schmidt*, 356 F.Supp. 620, 631 (W.D. Wis. 1973).

To the knowledge of *amici*, the only lower court decision to endorse the sweeping statement that prisoners have "no right to visitation" also states that "the question presented is that of the constitutional right to visitation generally and not that of the right to visits from family in particular." *White v. Keller*, 438 F.Supp. 110, 115 (D. Md. 1977). Moreover, *White*'s general argument against visitation rights was unnecessarily broad given the factual context of the case, because the prison policies upheld in *White* involved only the suspension of particular prisoners' or

(Continued on following page)

also by this Court's own opinions, which have never suggested that prison officials have the *carte blanche* suggested by the United States to restrict visitation. For instance, in *Pell v. Procunier*, this Court upheld restrictions on prisoners' contact with news organizations only after noting that "the California Corrections Department does not seal the inmate off from personal contacts with those outside the prison" but instead allows "visits from members of their families." *Pell*, 417 U.S. at 824-25. The Court also observed that "no discrimination in terms of content is involved" and that prison officials had not "restricted visitation by news reporters to interview prisoners for any content-based reasons." *Id.* at 826. If the United States were correct that prisoners retain *no* right of personal contact during incarceration, United States *Amicus* Brief at 10-11, then these observations would be irrelevant, because the prison officials could have restricted personal visitation for any reason or no reason whatsoever. Likewise, in every other case in which this Court has upheld restrictions on visitation, it has always demanded that the prison supply some legitimate penological justification for the restriction, usually related to the punishment of prisoners' abuse of visitation rights or the prevention of the circulation of contraband. *See, e.g., Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 457-58 nn.1-2 (1989) (upholding prison regulation restricting visitation by "[c]ertain visitors who are either a threat to the security or order of the institution or nonconducive

visitors' visitation privileges after they were suspected of smuggling contraband.

to the successful re-entry of the inmate to the community"); *Block v. Rutherford*, 468 U.S. 576, 586 (1984) (justifying ban on contact visits by "valid, rational connection" ban and "internal security of a detention facility"); *Pell v. Procunier,* 417 U.S. 817, 820-21 (1974) (upholding restrictions on contacts by press with inmates in wake of violent episodes partly resulting from unhindered access of prisoners to press).

Contrary to the assertion of the United States, this Court has never even hinted that the Constitution protects no right to visitation whatsoever because the right to visitation is somehow "in derogation of incarceration." U.S. *Amicus* Brief at 11. Instead, this Court has upheld only limited restrictions on visitation on the theory that such limited restrictions could be justified by some *specific* penological purpose. Amici freely concede that even the fundamental freedom to maintain the integrity of one's family through visitation must be qualified by the prison officials' need to protect and maintain security and order within the prison. In this sense, visitation rights can never be "absolute" or "unfettered." *See, e.g., Kentucky Dep't of Corrections,* 490 U.S. at 461. However, it does not follow from the absence of any "unfettered" or "absolute" right to visitation that prisoners have "no right to visitation" at all, even when security considerations are absent. Instead, the task of this Court has always been to analyze the particular restriction on visitation being challenged to determine whether it plausibly serves some penological purpose. The United States' contention to the contrary is a radical departure from precedent that this Court should reject. As Justice Kennedy has noted in his concurrence in *Kentucky Dep't of Corrections*, "[n]othing in the Court's opinion forecloses the claim that a prison regulation permanently

forbidding all visits to some or all prisoners implicates the protections of the Due Process Clause in a way that the precise and individualized restrictions at issue here do not." 490 U.S. at 465 (Kennedy, J., concurring).

The United States also maintains that "[i]nside prison, any residual interest a prisoner retains in that right [of familial association] is necessarily confined to members of the prisoner's immediate (*i.e.*, nuclear) family" and "cannot extend beyond the closest relationships, such as husband-wife or parent-child." U.S. *Amicus* Brief at 17. The United States can cite no judicial authority for this extraordinary statement, which is expressly contradicted by *Moore v. City of East Cleveland*, in which a plurality of this Court noted that "[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of *uncles, aunts, cousins*, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." *Moore v. City of East Cleveland,* 431 U.S. 494, 504 (1977) (plurality opinion) (emphasis added).

The United States' insistence that prisoners have rights only to associate with members of their nuclear families misunderstands *Turner*'s analysis of prisoners' rights. Incarceration does not automatically justify any arbitrary reduction of prisoners' rights. Instead, incarceration justifies limits on rights *if and only if the restriction serves some penological purpose*. Thus, prison authorities are free to restrict visitation even between husband and wife if such a restriction serves a penological purpose, such as prevention of contraband from entering the prison. *Block v. Rutherford*, 468 U.S. 576 (1984). However, absent such penological justifications, the fact of incarceration is

irrelevant to the scope of the right. Using this proper analysis, it is apparent that the prison context does not justify elimination of rights to association of extended family recognized in *Moore*. The degree of consanguinity between a prisoner and his or her visitors is utterly unconnected to any penological purpose, such as preventing escape or riot, interdicting contraband, or promoting prisoner rehabilitation. Nephews, nieces, and siblings are not somehow more threatening to prison interests than children and grandchildren. The prison's only interest in excluding such non-nuclear family members is to second-guess the visitors' and prisoners' judgments about which familial relationships matter to them – an interest that is simply not remotely "penological."

This Court should also reject the United States' invitation to limit rights of familial association to the prisoner's "nuclear family" because such a limit would result in an unjustifiable discriminatory impact against racial minorities. As the district court noted, African-American and Hispanic culture tends to place greater weight on the maintenance of familial relationships outside the nuclear families. *See* District Court's Stay Ruling, May 21, 2001 ("[MDOC's] definition of family . . . is also very Anglo Saxon oriented. [I]t [d]oesn't take into account the family structures of the African-American community where siblings relationships, nieces and nephews and extended family are so important. They are the most impacted by the restrictions . . . "). *See Bazzetta v. McGinnis*, 148 F.Supp.2d at 851 (exclusion disproportionately deprive ethnic minorities in and out of prison of important family relationships).

The United States has offered no reason why this Court should adopt such a racially and culturally biased

notion of "family." Instead, the Court should adhere to the familiar rule that individuals, not the state, should determine the importance of their familial relationships. Both MDOC and the United States *amicus* brief commit the error that *Moore*'s plurality attributed to the City of East Cleveland – the error of "select[ing] certain categories of relatives" as necessarily more important than others, over the objection of the very family members whose rights are at stake. *Id.* at 489-99.

II. MDOC has no legitimate penological interest justifying its prohibition on minors' visiting imprisoned relatives.

MDOC proffer two general categories of justifications for its broad bar on visitation by minors. First, they argue that this policy is reasonably related to "institutional security and safety" such as prevention of over-crowded waiting rooms or the smuggling of contraband into the prison. Petitioners' Brief at 26-28. Second, MDOC argues that the policy is needed to protect children from "physical or emotional abuse" which might occur in a visiting waiting room. *Id.* at 29.

As explained in more detail below, neither interest can justify MDOC's ban on minors' non-contact visits. There is no logical connection between exclusion of children and prison security: as the district court noted, children pose no unique or distinct threat of smuggling or over-crowding. As for protection of children's welfare, the prison authorities have no legitimate penological interest in second-guessing the non-incarcerated parents' judgment that visits serve the best interests of the child. To the contrary, determining that the benefits of visits outweighs the risks of a prisons' waiting room is the constitutional prerogative

of the parents under this Court's decision in *Troxel v. Granville,* 530 U.S. 57 (2000).

A. MDOC's Exclusion of Minors from Visiting Relatives in Prison Bears No Reasonable Relation to the Purpose of Reducing Overcrowding or Increasing Security in the Prisons' Visiting Facilities.

The district court properly found that MDOC's prohibition on minors in prison bore no logical connection to the goals of reducing over-crowded visiting rooms or insuring the safety or security of prisons. As the district court noted, there was simply "no evidence that children present any greater risk of smuggling than relatives over eighteen." *Bazzetta v. McGinnis*, 148 F.Supp.2d 813, 830 (E.D. Mich. 2001). Indeed, the district court found that MDOC's "speculat[ions]" about such security concerns were not MDOC's basis for excluding siblings, nieces, and nephews from prison. *Id.* As for the worries about over-crowded waiting rooms, the district court found that there was no reason to exclude children to reduce over-crowding: instead, the warden of any facility could always adjust visiting hours or reduce the total number of visitors without "excluding [children] altogether." *Id.*

The concerns about prison safety and over-crowded visiting rooms can only be regarded as pretexts for the exclusion of minors for the sake of their own protection. Children have no special capacity somehow to smuggle contraband past a plexiglass barrier in a non-contact visit, nor do they take up more space than adults in a waiting room. One could just as easily use worries about over-crowding or contraband to exclude Catholics or Democrats

from prison visiting rooms on the ground that such exclusions would reduce the number of visitors and thereby alleviate over-crowded visiting rooms and smuggling of contraband. Such exclusions would obviously not be permitted, despite their incidental effect on crowding, as their under-inclusiveness reveal their true purpose – to discriminate against particular classes of visitors and thus burden fundamental liberties of religious free exercise and political association. Likewise, an exclusion narrowly targeted to exclude only minor children has the manifest purpose of second-guessing the parents' judgment concerning whether visitation serves the child's welfare, a purpose that violates the parents' fundamental right of familial association.

B. MDOC has no legitimate penological interest in overriding parents' judgment about whether visits serve the best interest of their children by prohibiting minors from visiting imprisoned relatives to protect children from the prison environment.

MDOC's claim that they are entitled to disregard parents' own judgment and decide whether children will be harmed by visiting relatives in prison is directly contrary to this Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), the central holding of which is that state officials must defer to the parents' judgment of whether visitation serves the best interests of the child. In *Troxel*, this Court held that a Washington state judge violated Tommie Granville's 14th Amendment right to raise her children by "[giving] no special weight at all to Granville's determination of her daughters' best interests" when the

state court granted visitation rights to the child's grandparents over Granville's objection. *Troxel*, 530 U.S. at 69. A plurality of this Court stated that, by affording no deference to the parent's view of the child's best interest, "[t]he decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child." *Id.*

MDOC contravenes visiting parents' prerogative to raise their children in precisely the same way as the state statute at issue in *Troxel*. Even where parents believe that seeing close relatives serves the vital interests of their child, MDOC has overridden this parental judgment, replacing it with their own contrary view that the risks of a prison waiting room outweigh the risks of isolation from family members with whom the child might have critically important emotional ties. Balancing such risks is a difficult decision, but *Troxel* makes clear that it is a decision for the parent, not state officials, to make. *See* Justice Sandra O'Connor, *The Supreme Court and the Family*, 3 U. Pa. J. Const. L. 573, 577 (2001) (noting that, under *Troxel,* the mother "get[s] to make the final decision as to whom her children will visit" even though the underlying decision concerning visitation is "a difficult one"). The parent, not prison officials, are familiar with the particular characteristics of his or her own child – the child's age, maturity, attachment to a particular relative, and need for further contact with that relative. Because "natural bonds of affection lead parents to act in the best interests of their children," *Parham v. J.R.*, 442 at 602, parents can be trusted to pay attention to these child-specific circumstances to determine whether loss of contact with a loved one will harm the child more than occasional exposure –

under the eyes of the child's parent – to the seediness of a prison waiting room. Prison officials, having no expertise in child rearing, cannot claim that they are entitled to deference to their judgments on these matters of child psychology, which are far-removed from prison officials' penological experience and training.

The facts of this case illustrate the soundness of *Troxel*'s holding that state officials must defer to parental judgments concerning children's best interests. Here MDOC officials admitted their lack of any expertise in raising children and were unable to support their policy with anything beyond their personal philosophical beliefs.[4] The district court found that prison officials had essentially ignored the issue of whether the prohibition on minor visits might harm children. *Bazzetta*, 148 F.Supp.2d at 823. As one prison official testified, officials "just didn't think about" the possibility of children's being harmed by never seeing their imprisoned siblings, uncles, and aunts. *Id.* Indeed, prison officials stated that they didn't "have a clue" as to how many family relationships might be affected by their policy. *Id.* By contrast, plaintiffs presented testimony of the severe impact on children resulting from their inability to maintain contact with siblings and uncles

[4] Warden Pamela Withrow asserted that she had never talked to the siblings of any inmate to determine how their exclusion from seeing their brothers and sisters might affect them. Trial transcript at VIII:143. Although she worried that visits might make minors think that "prison is an okay place to come to," she admitted that she had performed no studies whatsoever to reach this conclusion and that her belief was simply based on her experience "just as a human being." VIII:144-45. On the basis of this experience, she believed that she was entitled to "trump" the parents' judgment concerning their own children's welfare. VIII:155.

who had often been major figures in their life prior to incarceration.[5] On the basis of this evidence, the district court concluded that "visual contact that occurs on non-contact visits is crucial to the family member's ability to reassure themselves about a loved one's welfare." *Bazzetta*, 148 F.Supp.2d at 831. These findings are amply supported not only by the trial record but also by widely accepted scholarship on child psychology of which this court can take judicial notice.[6]

---

[5] One parent testified that her daughters were "extremely upset" about not being able to visit their older brother, who had been sentenced to twenty to forty years when he was sixteen years old and had not seen his sisters since 1996. The daughters suffered from crying spells as a result of the loss of contact and had to be taken to a psychologist to address their extreme emotional distress. II:41-42. Another child testified about being upset at not being able to visit his uncle. II:74. One girl testified that her inability to visit with her older brother, who had been her "biggest support system" in her life, had contributed to her anorexia. II:92-93. The negative psychological effects of having incarcerated relatives are well-documented in the literature. *See, e.g.*, William H. Sack, *Children of Imprisoned Fathers*, 40 Psychiatry 163, 164-65 (1977). Likewise, the literature suggests that visitation with relatives can help to rebuild fractured families. *See* Justin Brooks & Kimberly Bahna, *"It's a Family Affair" – The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U. San Francisco L. Rev. 271, 306 (1994).

[6] *See, e.g.*, National Conference of Commissioners on Uniform State Laws, Model Sentencing and Corrections Act § 4-115, Comment (1979) ("Ample visitation rights are also important for the family and friends of the confined person"); Schneller, The Prisoners' Family: A Study of the Effects of Imprisonment on the Families of Prisoners (San Francisco: R and E Research Associates, 1976); Stanton, When Mothers Go to Jail (Lexington Mass: Lexington Press, 1980); Swan, Families of Black Prisoners: Survival and Progress (Boston: C. K. Hall, 1981); Shaw, Children of Imprisoned Fathers (London: Hodder and Stoughton, 1987); Fishman, Women at the Wall: A Study of Prisoners' Wives Doing Time on the Outside (Albany: State University of New York, 1990);

(Continued on following page)

Turner v. Safley requires courts to afford deference to prison officials' judgments about how best to pursue *penological* interests. As the district court's findings indicate, however, judgments about how children will be affected by loss of visual contact with relatives are not penological judgments about which prison officials have any discernible expertise. It would be inconsistent with *Troxel* and common sense to allow prison officials' casual *ipse dixit* about children to trump the parent's informed judgment about what will serve their child's psychological welfare. There is a possibility that children will be exposed to unpleasant sights in a prison waiting room, as they might be in a park, on a sidewalk, in a hospital, or in a grocery store parking lot.[7] Parents and not state officials, however, have the prerogative of deciding whether the dangers of such experiences are outweighed by the trauma of losing all contact with close relatives.

Carlson and Cervera, Inmates and Their Wives: Incarceration and Family Life (Westport Connecticut: Greenwood Press, 1992).

[7] MDOC officials could produce evidence of one such incident out of the literally hundreds of thousands of visits that occur annually in their facilities. Def-App brief at 10, 15. There was no evidence that the child in question actually saw her father's penis exposed behind the barrier of the non-contact booth: the warden who testified about the incident admitted that she did not know how it was possible for a child seated on her mother's lap to see over a barrier approximately four feet high and under a ledge. Trial transcript at VIII:140-41. If the child had gotten a glimpse, there was no evidence that she suffered any trauma from the incident. Moreover, there was no showing that the likelihood of seeing an exposed penis is greater in a prison visiting room than in a park or other semi-public area. Of course, MDOC's visitation policies would not have prevented this incident, as the child fell within the exception for visits to parents. To eliminate every possibility of such exposure, government officials would have to bar children from ever leaving the nursery.

Although the U.S. Supreme Court has not yet had occasion to apply *Troxel*'s holding to the context of prisons, the only lower court to confront the issue has held that parents rather than prison officials are entitled to deference concerning whether visitation serves the best interests of the child. In striking down a prohibition on contact visits by minors, the U.S. District Court in *Valentine v. Englehardt*, 474 F.Supp. 294, 302 (D.N.J. 1979), held that prison officials could not justify the prohibition as an effort to protect the children, because "it simply does not lie with jail officials to determine what is in the best interests of the inmates' children." *Valentine* stated that prison officials were not entitled to deference on this issue because it was a concern "which does not properly rest with jail authorities." *Id. See also Hardaway v. Kerr*, 573 F.Supp. 419, 426 (W.D. Wis. 1983) (prison may not bar woman from visiting prison inmate in order to protect her from being exploited by inmate, because this "sort of paternalistic regulation" does not serve any legitimate penological objective related to prison security, rehabilitation, or deterrence of crime). *Amici* urge that *Valentine*'s analysis is required by this Court's decision in *Troxel* and, more generally, with the well-established principle that parents are entitled to deference concerning judgments about their children's best interest.

III. Michigan's policy of permanently barring prisoners who have incurred two citations for substance abuse from any visitation with any relative is an exaggerated response to the problem of substance abuse.

The district court struck down MDOC's policy of imposing *permanent* and *total* bans on all visits to

prisoners found guilty of two substance abuse misconducts, even when those misconducts have no connection to visitation. The district court held that such a draconian policy was an unjustified interference with the inmates' rights of familial association under *Turner v. Safley* as well as a denial of the inmates' rights of procedural due process and violative of the 8th Amendment.

Amici urge this Court to uphold the lower courts' holding that MDOC's policy was an exaggerated response to the problem of substance abuse in prisons for three reasons. First, the permanent and total ban severely burdens fundamental rights of familial visitation. Second, contrary to the suggestion of the *amicus* briefs filed by various states, MDOC's policy is uniquely severe, indicating that it cannot be justified by the collective experience of the states' prison authorities. Finally, the district court did not err in finding, on the basis of substantial evidence in the record, that MDOC's permanent ban actually undermined the goal of discouraging substance abuse.

A. MDOC's permanent and total ban on visitation burdens fundamental rights of familial association.

By permanently and totally suspending visitation rights of prisoners and their visitors, MDOC has imposed an extraordinary burden on their rights of familial association. For the reasons set forth in Part I of this brief, prisoners retain such rights of familial association unless their restriction is a reasonable means of advancing a legitimate penological interest. MDOC's policy cannot be justified as such a reasonable means, because it completely and permanently eliminates all ability for prisoners and close family members to visit *even when there is no*

nexus whatsoever between visits and the underlying conduct that MDOC wishes to deter.[8] More complete elimination of the opportunity for familial association would be difficult to imagine.

The United States *amicus* brief argues that MDOC's permanent ban on visits is a reasonable means for deterring substance abuse because prisoners care deeply about the right to see their family and friends "will think twice about violating the prison's substance abuse rule." U.S. *Amicus* Brief at 27. This argument, however, proves too much. The United States' logic would entail that *any* restriction on a fundamental right, no matter how severe, should be upheld if the restriction penalizes conduct that the prison authorities can legitimately deter. By this logic, MDOC could punish prisoners guilty of substance abuse by denying them access to legal counsel, because such a right is highly valued by prisoners. But such deliberate targeting of constitutional entitlements to penalize substance abuse would not automatically be justified under *Turner* simply because of such a deterrent effect. Likewise, total and permanent suspension of a prisoners' right to see a child, spouse, or parent cannot be automatically upheld simply because prisoners value the right and will be deterred by its threatened loss. The right is protected precisely because it *is* highly valued by right holders. Its importance to prisoners cannot be the basis for allowing its suspension without rendering the right a dead letter.

[8] The use of home-made alcohol and possession of prescription medicine are unconnected to the outside world. Illegal drugs come in through numerous routes including mail, employees and property.

The United States maintains that this Court has upheld prison regulations that interfere with prisoners' visitation. However, all such cases involved burdens on visitation rights that can be easily distinguished from MDOC's permanent ban on one of two grounds.

First, this Court has upheld prison policies that have the effect but not the purpose of making visits between family members and prisoners more difficult. For instance, in *Olim v. Wakinekona*, 461 U.S. 238 (1983), this Court upheld the transfer of a prisoner from Hawaii to a mainland prison, making it extremely difficult for his family and friends to visit him. However, there was no contention that the prison authorities imposed the transfer on Wakinekona for the *purpose* of impeding his family's ability to visit him: there simply was no maximum security facility suitable for Wakinekona in Hawaii. *Olim*, 461 U.S. at 241. By contrast, MDOC has deliberately deprived inmates of visits from family members precisely because those visits are "among the most highly valued privileges in prison life." U.S. *Amicus* Brief at 27; *Bazzetta*, 148 F.Supp.2d at ___. It is a familiar point that state actions with an incidental and unintended effects on the exercise of constitutional rights are judged under a more lenient standard than the state's deliberate effort to curtail a constitutional right.[9] *Olim* and similar cases do not

[9] *See, e.g.*, *Washington v. Davis*, 426 U.S. 229, 240-45 (1976) (To show deprivation of equal protection, plaintiff must prove existence of purposeful racial discrimination; law's incidental effect of disproportionately burdening racial minority insufficient to show violation of equal protection); *Branzburg v. Hayes*, 408 U.S. 665, 682, 707-708 (1972) ("the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or

(Continued on following page)

support the view that prison authorities can intentionally deprive prisoners of all visits with relatives for the purpose of punishing the prisoner by such a deprivation.

Second, this Court has held that prison authorities may deprive prisoners of visitation in order to prevent or punish abuse of visitation rights. *Block v. Rutherford*, 468 U.S. at 586 (jail may ban contact visits to prevent contraband from entering prison); *Kentucky Dep't of Corrections v. Thompson*, 490 at 457-58 nn.1-2 (upholding prison regulation restricting visitation by "[c]ertain visitors who are either a threat to the security or order of the institution or nonconducive to the successful re-entry of the inmate to the community"). Where a prisoner has abused visitation rights, prison authorities act reasonably in suspending those rights to prevent the abuse. MDOC's policy, however, suspends visitation even for prisoners whose substance abuse is entirely unrelated to visitation.[10] The wholly innocent spouse of an inmate who obtains alcohol manufactured within the prison is thus deprived of all contact with her husband. No precedent of this Court has ever upheld a total, permanent ban on visits between close family members and prisoners even when the ban

criminal statutes of general applicability" but "harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification"); *Arcara v. Cloud Books*, 478 U.S. 697, 708 (1986) (O'Connor, J., concurring) ("First Amendment standard of review" does not apply to law with only "speech-inhibiting consequences" but would apply to "pretextual" use of nuisance law to suppress expression).

[10] The use of home-made alcohol and possession of prescription medicine are unconnected to the outside world. Illegal drugs come in through numerous routes including mail, employees and property.

was imposed to punish conduct utterly unrelated to visitation.

B. No other state has adopted a permanent and total ban on visitation for misconduct unrelated to visitation

MDOC's permanent ban on visitation is not only an attack on familial association unsupported by any precedent of this Court. It is also unique among state laws: As the district court below found, other states' policies "are not nearly as harsh" as MDOC's permanent ban. *Bazzetta*, 148 F.Supp.2d at 835. No other state currently penalizes misconduct unrelated to visitation with a permanent and total ban on all visits. MDOC can hardly justify its permanent ban by reference to the collective experience of state governments.

The brief submitted on behalf of several amici states by the Attorney General of Colorado observes that several states punish inmate misconduct by suspending visitation. States' Amici Brief at 4-9. However, an examination of the policies cited by the amici states' brief confirms the district court's conclusion that MDOC's policy is uniquely harsh. None of the state policies cited by these amici impose a sanction of severity comparable to MDOC's permanent and total ban. Five of the amici state governments bar inmates from receiving *contact* visits as a consequence of drug offenses.[11] Eight of the amici state governments impose

[11] These five states are Indiana, Missouri, Pennsylvania, South Dakota, and Texas.

only *temporary* loss of visitation.[12] The amici states also cite the policies of nine states which did not sign the state amici's brief. However, seven of these states impose only temporary loss of visitation.[13] Of the two remaining states, New York allows permanent suspension of visitation only for offenses related to visits.[14] Only one state, Minnesota, imposes an "indefinite" loss of visiting privileges for an offense unrelated to visitation (positive urine analysis, refusing a urinalysis, or attempting to alter a urinalysis).[15] However, even Minnesota requires automatic review of such a penalty annually, and the prison authorities have discretion to impose only a loss of contact visits.[16]

Far from being an ordinary method of prison administration, therefore, MDOC's permanent and total ban is unique among states' penal policies. Contrary to the brief submitted by various Amici States, States' *Amicus*

[12] These eight amici states' policies can be found at Colorado Dep't of Corrections Admin. Reg. 300-01.IV.L.10.b; Florida Admin. Code Rule 33-601.731(2)(b); Idaho 604.02.001.0505.00; Md. Div. of Corrections DCD 105-4 App.3; Miss. Dep't of Corrections S.O.P. 28-03-02 & 31.03.01; Oklahoma Dep't of Corrections OP-030118(II)(E)(5); and Tennessee Dep't of Corrections Reg. 507.01(VI)(F)(7).

[13] These seven states' policies can be found at California Admin. Code, title 15 §§3315(f)(5)(I), 3323(d)(6); Iowa Corrections Policy No. IN-V-3(V)(L); N.H. Dep't of Corrections PPD7.9(IV)(P); N.C. Inmate Disciplinary Procedures CH.B. §§.0202 &.0204; Ohio Dep't of Rehabilitation & Correction §308 No. 4, Part VI(K)(2) & §312 No. 02, Pt. (VI)(L); S.C. Dep't of Corrections OP-22.09; and Rhode Island Admin. Code 06.070.004(III)(E)(13).

[14] N.Y. Comp. Codes, Rules, & Regs. Title 5, §200.5(a)(4) and 5(f).

[15] Minnesota Dep't of Corrections Directive 302.100B. Minnesota also allows an indefinite suspension for smuggling, disruption of the visiting area, but both of these offenses are clearly related to visitation.

[16] *Id.*

Brief at 4, "[t]he collective judgment of correctional officials throughout the nation" indicates that MDOC's policy *is* an exaggerated response to substance abuse.

C. Substantial evidence supports the district court's finding that MDOC's permanent and total ban on visitation promoted rather than deterred substance abuse.

Finally, there was substantial evidence in the record to support the district court's finding that MDOC's policy was self-defeating. The district court relied on plaintiffs' expert testimony to conclude that "visitation with family and friends is the single most important factor in stabilizing a prisoner's mental health, encouraging a positive adjustment to the prisoner's term of incarceration, and supporting a prisoner's successful return to society." *Bazzetta*, 148 F.Supp.2d at 851. Moreover, the district court found that elimination of visitation had a "devastating" impact on prisoners suffering from substance abuse or other mental health problems, *id.* at 852-53, such that the elimination of visitation would "tend to increase a prisoner's tendency to resort to drug abuse." *Id.* at 854.[17] The district court found that this evidence was not merely unrefuted but actually unchallenged by MDOC. *Id.*

[17] The testimony was plaintiffs' experts was consistent with prevailing theories connecting contact with family members to rehabilitation of convicts. *See, e.g.*, Bonnie Carlson & Neil Cervera, *Inmates and Their Wives: Incarceration and Family Life* (Westport, Connecticut: Greenwood Press, 1992) (citing studies indicating that prisoners who are successful in maintaining family ties are less likely to take on dysfunctional mannerisms, attitudes, and behaviors of professional criminals).

Given this uncontradicted evidence that MDOC's policy was self-defeating, MDOC cannot simply rest on the normal deference to which prison officials are entitled. Deference is not a rubber stamp of approval. Although prison officials are entitled to deference in their administration of prisons, this deference is only afforded "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response." *Bell v. Wolfish,* 441 U.S. 520, 548 (1979). *See also Pell v. Procunier*, 417 U.S. at 827. The uncontradicted record in this case provides ample substantial evidence that MDOC's permanent and total ban on visitation actually promoted rather than deterred substance abuse and, thus, was the epitome of an exaggerated response.

Respectfully submitted,

RODERICK M. HILLS, JR.
Counsel of Record
UNIVERSITY OF MICHIGAN
LAW SCHOOL
437 Hutchins Hall
625 South State Street
Ann Arbor, MI 48103-1215
(734) 763-9634

APPENDIX

National Council of La Raza

The National Council of La Raza (NCLR) is a private, nonprofit, nonpartisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. The NCLR opposes restrictive visitation policies that maintain prisoners isolated from their families, and which further punish prisoners for rule violations not related to visitations, contrary to reintegrating prisoners into society. Because family ties are extremely important in the Latino community, including our relationships with extended family members, these rules would have a disproportionate impact on Latino prisoners and their families.

Southern Center for Human Rights

The Southern Center for Human Rights was created in 1976 to respond to the deplorable conditions of prisons and jails in the South. The Center works with prisoners and their families to urge fair treatment of all prisoners.

Perry Johnson, former Director Michigan Department of Corrections

The MDOC was my professional life for thirty years during which I worked in all prison security levels, served as the Warden of the state's largest prison in Jackson, and served as MDOC Director for twelve years, the second longest tenure in Michigan's history. The prison visiting rules that are at issue in this case, which were implemented in 1995, drastically departed from the Department's past practice and tradition and are at odds with

nationally and internationally recognized correctional standards.

Most who work in prisons or have studied them agree that social isolation and alienation from family and friends are among the most harmful effects of incarceration and are major contributors to recidivism. I leave it to others to discuss whatever adverse affect Michigan's restrictive prison visiting policies may have on children who are being denied contact with their biological parents. The importance of visits for prisoners is reflected in the American Correctional Association (ACA) Standards 3-4440 and 3-4441, the United Nations Minimum Rules for the Treatment of Prisoners Rule number 37, and the Council of Europe Prison Rules number 43.1 through 45.

The MDOC regulations in this case run contrary to the above principles absent any substantial reason to justify them. For example, they banned visits from prisoners' minor siblings, nieces and nephews (and others) claiming that this would make smuggling more difficult, yet the visits in question would have been conducted in secure non-contact facilities specifically designed to prevent the introduction of drugs, weapons, devices for escape and other contraband, or the possibility of assault. Another reason given for enacting these restrictions was to reduce the volume of visits for their already overcrowded visiting facilities. While most prison systems face this problem of overtaxed visiting facilities on occasion, especially those located near urban areas, the accepted corrections practice for managing the problem is to ration the number and length of visits for all inmates, not to arbitrarily ban visitors. Furthermore, it should be noted that nieces, nephews and siblings are considered "family" in the closest and most intimate way by African-Americans,

Native Americans, and Hispanics, minorities overrepresented in all prisons, and the MDOC's failure to honor this fact in their visiting policies demonstrates indifference to those cultures.

Most troubling is the ban on all visits for prisoners who twice violate the department's drug abuse policies; this they said was part of their "zero tolerance" policy toward drug abuse. To be sure, the use or trafficking of controlled substances and alcohol or the misuse or resale of prescribed medication is cause for concern in our prisons and should be controlled to the extent possible. However, the MDOC did not, according to public testimony to the Legislature, have a serious prison drug problem – a position backed up by eight years of carefully controlled drug testing – so no crisis existed that would justify such a harsh and harmful policy. Further, MDOC possessed and used a broad range of sanctions, aside from banning visits, in their "zero tolerance" campaign such as punitive segregation, denial of or removal from work programs, denial of community placement, loss of good time (disciplinary credits), and negative reports to the Parole Board. Using permanent denial of visiting rights as a punitive sanction for prison misconduct, even though such misconduct was unrelated to visiting is reprehensible.

I understand that principles and policies that are advocated professionally may not be carried forth in practice, but I do not believe that to be the case in this instance. As President of ACA for two years, member of its Executive Committee for six years, and active member of the ACA Standards Committee responsible for the promulgation of its national standards for ten years, never once did a corrections agency or individual propose or even discuss such restrictive punitive prison visiting rules as

are before the Court in this case. Furthermore, I have inspected prisons in twenty states and five foreign countries, including China and I never encountered such restrictive and punitive practices. Michigan's practice is truly unusual and the exception in my view.

Robert Brown Jr., former Director, Michigan Department of Corrections

I retired from the MDOC in May, 1991, after serving thirty years with the agency, the last seven years as its director. The previous fourteen years were served as the Deputy Director in charge of the Bureau of Correctional Facilities overseeing the operation of Michigan's prisons. Prior to that assignment, I worked at two maximum-security institutions, a minimum-security facility and five years as a parole officer in the city of Detroit, Michigan. I have also been assigned on a temporary basis as the superintendent of a facility housing female felons. My interest in the development and promotion of professionally accepted standards for the operation of correctional facilities and in efforts to increase the efficiency and effectiveness of correctional systems prompts me to speak up on this matter.

I have been an American Correctional Association (ACA) accreditation auditor since 1980 and served on the ACA's standards committee for the last six years before state retirement. Since leaving the MDOC, I continue to audit and consult, having visited over 75 jails and adult correctional facilities of all security levels in the United States and Canada, including the United States Bureau of Prison's Administrative Maximum Facility in Florence, Colorado.

In my opinion and experience, the visitation restrictions at issue in this case are extreme and unnecessary for the safe operation of any correctional facility. Individual visiting problems can be eliminated by limiting visiting rule violators to non-contact visiting as permitted by accreditation standards and practiced across the country, including at the United States Penitentiary Administrative Maximum Facility where many of the country's most difficult to manage prisoners are held. In November, 1987, while I served as Director of the Department, random urine testing was implemented in the facilities and drug and alcohol use was reduced. After my retirement the testing continued and the numbers continued to decrease to the level of 2.0% positives without these rules. We also limited individual prisoners to non-contact visiting when necessary. Access to contraband is not limited to visiting activities, and other security weaknesses must be explored. Adequate substance abuse counseling and treatment programming are a must.

Corrections practitioners and those who have studied recidivism agree that contact with family and family support play important positive roles in an inmate's rehabilitation. The policies at issue add to the instability of offenders making the offenders more difficult to manage during the incarceration and increasing the difficulty of returning to the community when released. To deliberately isolate prisoners from visits with their families as a punishment for misconduct that is unrelated to the visiting room is counterproductive to the goals of public safety, staff safety and the humane incarceration of offenders. I hope my observations and opinions will be helpful to the court.

American Association of Community Psychiatrists

Since 1984, the American Association of Community Psychiatrists represents community psychiatrists, who regularly find themselves serving as advocates for patients who must rely on increasingly dwindling public resources. The AACP is concerned about these visit restrictions because quality visitation with loved ones throughout a period of incarceration is a prerequisite for the maintenance of sound mental health.

National Mental Health Association

The National Mental Health Association is a nonprofit organization dedicated to promoting mental health, preventing mental disorders, and achieving victory over mental illness through advocacy, education, research and services. For over 90 years, it has been recognized as a leader in bringing attention to the mental health needs of all Americans – particularly under-served groups – and working to expand access to services. NMHA also seeks to remove the stigma and prejudice associated with mental illness and has more than 340 state and community affiliates nationwide. NMHA believes in the important role visitation with incarcerated parents or extended family members plays in the mental health of children, the stability of families, and the rehabilitation of prisoners, and that such visitation is within the rights of both prisoners and their familial visitors. It sees the curtailment of this right as an additional threat to the children of prisoners and to their family stability. An estimated 1.5 million children in the United States have a parent in prison. Children of incarcerated parents are often burdened with multiple risk factors, including the stress of separation,

trauma, and stigmatization. Curtailment of visitation with incarcerated parents or relatives in extended families only adds to this stress and can lead to future mental health problems. In addition, the curtailment of familial contacts can lead to mental health problems on the part of the prisoner and pose a barrier to his or her successful reintegration into the family and community upon release. This may well be a primary contributor to recidivism.

National Alliance for the Mentally Ill and its Michigan Chapter

The National Alliance for the Mentally Ill is the nation's largest grassroots organization dedicated to improving the lives of people with severe mental illnesses, and its members have a long history of advocating for appropriate treatment for individuals with severe mental illnesses who are incarcerated. The Michigan Chapter of the National Alliance for the Mentally Ill was formed in 1986. Between 16% and 30% of prisoners have mental illness. When a loved one with or without mental illness is imprisoned, it has a devastating impact on the well-being of family members, not only for the prisoner. Deprivation of visitation fosters anger, hopelessness, and despair, and may precipitate mental illness in family members, countering family efforts at rehabilitation and reconciliation and may destroy family relationships. These harsh restrictions are demoralizing, dehumanizing, and amount to cruel and unusual punishment of families and prisoners.

National Association of Black Social Workers

The National Association of Black Social Workers is a national non-profit organization organized to provide a

forum through which Black Social Workers and workers in related fields of social services can exchange ideas, offer service and develop programs in the interest of the Black community and the community-at-large; including support for community programs and to advocate for social planning. The NABSW supports the district court decision in this case finding that the challenged visitation restrictions violate the constitutional rights of the Michigan prisoners, because it is consistent with its Family Preservation Policy for the improvement of Black family life in the United States of America. This policy recommends that the families be kept together whenever possible, especially parent-child relationships. The MDOC visitation restrictions deny children their right to visit their parents.

Center for the Study of Social Policy

The Center for the Study of Social Policy provides public policy analysis and technical assistance to states and localities in the areas of family and children's services, and strongly supports the continuous right of children to visit their incarcerated parents and relatives. Denying children the opportunity to know their parents and relatives is discriminatory, especially to children of color.

Correctional Association of New York

Founded in 1844, the Correctional Association of New York ("CA"), is a private, not-for-profit organization that conducts prison monitoring, research, public education and policy analysis and advocacy in pursuit of two principal goals: a fair and humane prison and criminal justice system and a safe and just society. The CA is the only private organization in New York State that has legislative

authority to visit prisons and report its findings to the public and policy makers that authority having been given in 1846. On a regular basis, CA representatives visit and inspect prisons and have direct contact with prisoners, former prisoners and their families. Whether inmates maintain ties with their families and loved ones significantly affects their ability to cope with the prison experience and to make a crime-free adjustment to society upon their release. The MDOC's visiting policies undermine this important principle.

Justice Policy Institute

The Justice Policy Institute is a Washington, DC-based think tank that is committed to reducing society's reliance on incarceration.

Michigan League for Human Services

The Michigan League for Human Services recently celebrated its 90th anniversary of active involvement in shaping social policy. Throughout its history the League has maintained its identity as an "independent association of citizens interested in the health and welfare of Michigan." We take an interest in this case because of its impact on child well-being, particularly low-income children and children of color, the most vulnerable children in our society. These rules that restrict children's visitation to incarcerated parents result in irreparable damage to the vital child-parent bond by denying contact for extended periods of time.

Prisons and Corrections Section of the State Bar of Michigan

[Notice having been given in writing to the voting members of the Section's governing Council, excluding the chair, this statement of interest was adopted on behalf of the Section with a vote of 10-2 (2 members abstaining). The views expressed are those of the Prisons and Corrections Section and do not necessarily represent the views of the State Bar of Michigan.] The Prisons and Corrections Section of the State Bar of Michigan has about 150 attorney members who are knowledgeable and concerned about various issues affecting Michigan prisons, prisoners, probationers and parolees. The Section publishes a newsletter, presents informational programs, files amicus briefs, and takes positions on legislation, court rules, and Michigan Department of Corrections policies. On May 1, 1999, the Section council unanimously adopted a position statement entitled "Family Values Behind Bars". The statement includes a list of 12 fundamental principles involving visitation. Among these are the following, which all address concerns at issue in *Overton v. Bazzetta*: 2) Visits should not be restricted or denied except for reasons specifically related to visiting behavior of the persons involved; 4) Children should be allowed to visit with their incarcerated parents even if there is an intervening adoption, so long as the adoptive parents consent and it is not contrary to an order of a court; 11) Children under the age of 18 who otherwise fit the definition of permitted visitors should not be excluded so long as they are accompanied by an appropriate adult.

League of Women Voters of Michigan

The League of Women Voters promotes active and informed participation of citizens in government and advocates on policy issues after careful study and deliberation. As a state chapter, the League of Women Voters of Michigan conducted a two-year study after which, in 1989 it adopted its Prisons in Michigan Position that includes supporting facilities to enable parents and children to maintain family relationships.

Paula Schaeffer

Paula Schaeffer, Director of the Female Offenders Unit of the Minnesota Department of Corrections advocates for women offenders and their children, recognizes that visitation is absolutely necessary to maintain the bond between mother and child. The Minnesota DOC has always been committed to addressing the needs of women inmates and their children, including visitation, believing that visitation for female inmates with their children should be viewed as a right, not a privilege that can be taken away.

George Sullivan

George Sullivan, is a former Deputy Director for Operations, Colorado Department of Corrections, Superintendent of Oregon State Correctional Institution, and Warden of the Penitentiary of New Mexico.

Urban Justice Center

The Urban Justice Center is a non-profit legal organization that provides direct representation and system-

wide advocacy on issues of concern to poor people. For the last five years, its Mental Health Project has worked with prisoners with psychiatric disabilities, including class action litigation establishing the right to discharge planning for New York City jail inmates with mental illness. Its work with prisoners has shown repeatedly how crucial the role of family is in the life of a prisoner and how drastically reduced a prisoner's likelihood of successful reintegration into the community is if the connection with family is broken. Denying prisoners visits with family is not only cruel and unusual – it also wrongs the entire community by reducing the likelihood that the prisoner will be able to lead a law-abiding life upon release.

Prison Access Working Group

The Prison Access Working Group is dedicated to promoting understanding of issues surrounding incarceration and criminal justice, and seeks to facilitate communication between the general public, students, prisoners, ex-offenders, and the criminal justice establishment. PAWG believes that visiting prisons and hearing and exchanging perspectives firsthand is the best way to achieve its goals.

Stop Prisoner Rape

Stop Prisoner Rape is a national human rights organization that seeks to end sexual violence against men, women, and youth in all forms of detention. Through education, outreach, and advocacy, SPR confronts indifference and combats the causes of prisoner rape. Research shows that prisoners who are cut off from loved ones are more vulnerable to attack and rape, and after they are

raped, the lack of a support system makes their healing all the more difficult. Also, as Wilbert Rideau points out in LIFE SENTENCES (New York Times, 1992), prisoners who have quality visits with loved ones feel more connected to the human community and are less prone to perpetrate rape and less vulnerable to being raped. Many wardens and experienced correctional staff readily agree, pointing out that prisoners who maintain quality contact with loved ones throughout their terms are less prone to get involved in violence of all kinds, including rape.

Critical Resistance

Critical Resistance is an Oakland, California-based national movement challenging the growth of the Prison Industrial Complex by advocating the expansion and support of schools and educational institutions, health programs, housing, employment and treatment services and the simultaneous reduction of correctional funding and facilities. Critical Resistance advocates for better treatment and services to prisoners, their children and families, including family visiting and visitation with children.

Bishop Coleman McGehee

Bishop Coleman McGehee, retired Episcopal Bishop of the Diocese of Michigan, has had extensive experience working with prisoners and their families for over 40 years of ministry and prior career as an Assistant Prosecuting Attorney in the State of Virginia. He has seen firsthand the difference that contact with family members makes to the rehabilitation of prisoners, and on many occasions, worked to encourage family members to maintain a

connection with their incarcerated loved ones. The MDOC's limitations on prisoners' visitation rights is detrimental to their well being and prospects for rehabilitation.

Rt. Rev. R. Stewart Wood, Jr.

The Rt. Rev. R. Stewart Wood, Jr., retired Episcopal Bishop of the Diocese of Michigan, recognizes that in fulfilling its mission of service to the community, the church recognizes that family relationships are vital to the transition of prisoners back into society. Over the years, the outreach efforts of churches within the diocese have shown the importance of contact between prisoners and their family members. The restrictive visitation rules for prisoners in the state of Michigan cause great harm to prisoners, their families and the community.

Metropolitan Organizing Strategy Enabling Strength

The Metropolitan Organizing Strategy Enabling Strength (MOSES) is an ecumenical and interfaith community organization of some 72 member congregations reflecting the diversity of the Detroit metropolitan area. MOSES and its member congregations actively promote social justice and public safety regionally, statewide, and nationally. MOSES created the Safe Zone Project that is a nationally recognized, citizen-based community policing and drug prevention strategy. Many members of the congregations that comprise MOSES have family members who have been or are now incarcerated. Preserving and safeguarding the integrity of the family unit is central to our mission. MOSES asserts that the MDOC visitation

rules not only cause grave harm to prisoners, their families, and their loved ones, but also harm our member congregations by jeopardizing the essential family and community relationships of prisoners, many of whom are eventually released into our community.

Episcopal Church of the Incarnation

The Episcopal Church of the Incarnation is a mission church within the Episcopal Diocese of Michigan that has done outreach to prisoners within the MDOC and supporting ex-offenders in their transition back into society for over 17 years. The church believes that contact between inmates and their loved ones is one of the single biggest factors in predicting whether an offender can successfully transition back into society, and that the MDOC visitation rules adopted in 1995 have caused grave harm not only to the prisoners, their families and their loved ones, but also to the broader community when the ex-offenders are released.

Restorative Justice Ministry

The Restorative Justice Ministry, Catholic Diocese of Lansing covers 10 Michigan counties with over 90 churches and 40 schools, and more than 180,000 Catholics as well as other members of the community. It has served inmates of the DOC and their families for over 60 years.

Shalom Center for Justice and Peace

The Shalom Center for Justice and Peace is a ministry of the Lansing District of the United Methodist Church in Michigan, acting as the social action arm of the 67

churches on a variety of social issues, including the effects of incarceration on prisoners and their families.

Colonel Robert C. Lynn

Colonel Robert C. Lynn, United States Air Force, retired, has extensive background working with prisoners as a reserve air force chaplain, chaplain in all of the major prisons in Oregon, Religious Program Manager for the Washington State DOC, and chair of Washington State DOC Religious Advisory Committee, which has shown him the importance of visits with family and friends to the well being and rehabilitation of prisoners.